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Supreme Court U. S.
FILED
MAR 29 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1976
No. 76-422

E. C. DOTHARD, *et al.*,

Appellants,

vs.

BRENDA M. MIETH, *et al.*,

Appellees.

On Appeal From the United States District Court for the Middle District of Alabama

[redacted] **State of California** [redacted]
[redacted] **Amicus Curiae Brief.**

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On Appeal From the United States District Court for the Middle District of Alabama

Motion for Leave to File Brief as Amicus Curiae

The State of California respectfully moves this Court for leave to file the accompanying brief in this case as amicus curiae.

Consent of the parties has not been sought since this motion is filed by the State of California through its duly elected and acting Attorney General.

The State of California has an interest in this case in that California has adopted throughout its prison system a policy of "normalization" because officials of the California penal systems believe that rehabilitation will be enhanced by the presence of professional staff of both sexes in the State's penal institutions.

California is concerned that the arguments of appellees do not sufficiently emphasize the interest of the state in maintaining the policy of having women in the prison system and in ensuring equal employment applications for its female citizens.

Dated: March 28, 1977.

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Interest of Amicus Curiae

The Attorney General of the State of California files this brief on behalf of the State of California and particularly the California Department of Corrections, the California Youth Authority and the Fair Employment Practice Commission. California has a well established policy of encouraging opportunities for women in all law enforcement agencies in the State, not only as an equal opportunity obligation, but also as a rehabilitative measure in prison settings. Consequently, California considers it vital to the furtherance of that policy that the decision of the lower court herein be affirmed.

The Department of Corrections and the Youth Authority have adopted as one of their primary responsibilities a policy of "normalization" within their respective institutions. Officials of these departments believe that rehabilitation will be enhanced by providing an environment which includes trained and competent professional staff of both sexes because that environment more closely approximates society than does a unisexual institution. The integration of women into the staffs of previously all male facilities has been going on for more than ten years. Officials of California are concerned that a decision by this Court overturning the decision below might have the effect of destroying or seriously impairing the normalization policy in California's penal institutions.

Additionally, the Fair Employment Practice Commission of California, which is charged with the duty of enforcing California's Fair Employment Practice Act (California Labor Code §§ 1410 *et seq.*) is concerned that an adverse decision in this matter will drastically

curtail its continuing efforts to insure that women have equal employment opportunities in all law enforcement agencies throughout the state.

Questions Presented

1. Does Alabama's Prison Regulation 204, which serves to exclude women correctional officers from serving in contact positions in all-male penitentiary violate Title VII of the 1964 Civil Rights Act (42 U.S.C. §2000e-2)?

2. Does Alabama's Prison Regulation 204 violate the Equal Protection Clause of the Fourteenth Amendment?

3. Do prisoners have a right of privacy which would justify excluding women correctional officers from serving in contact positions in all-male penitentiaries?

Statement of Facts

The facts are essentially set forth in the Jurisdictional Statement of appellants, as modified in the Motion to Dismiss or Affirm of the Appellees. The Lower Court decision has an extensive exposition of all the facts upon which it based its decision. *Mieth v. Dothard*, 418 F.Supp. 1169 (D.C. M.D. Alabama, Northern Division, 1976).

Although the case below dealt with the effects of various Alabama statutes and regulations on the hiring of women for both the classification of State Trooper and the classification of Correctional Counselors (Prison Guards), no appeal has been taken from the Lower Court decision concerning the class of State Trooper. Appellants have appealed from the decision as it affects hiring for the class of Correctional Counselors.

For purposes of this Amicus brief, the key facts, as indicated in the decision below are:

One of the various merit system positions in the Alabama Correction System is that of correctional counselor. The entry level position for correctional counselor is that of correctional counselor trainee. The job description of a correctional counselor I is as follows:

> Patrols prisons and prison yards; stands watch in halls, at gates, or in wall towers; makes regular reports to supervisors.
>
> Supervises and keeps order among prisoners assigned to work in prison kitchens, shops, mills, laundries, or on farms.
>
> Enforces regulations covering sanitation and personal care.
>
> Inspects all traffic into and out of prison proper.
>
> Maintains constant watch for and reports unusual conditions or disturbances; keeps firearms in readiness for use if necessary; takes required action in emergencies to prevent escapes or suppress disorder; assists in recapture of escaped prisoners.
>
> Explains to inmates rules, procedures and services available at correctional institutions; counsels individual inmates regarding personal problems, educational and vocational opportunities and work assignments.
>
> Evaluates inmate behavior and adjustment to a correctional environment; submits evaluation reports. Instructs inmates in personal hygiene, discipline and proper etiquette.
>
> Performs related work as required.

As the above job description indicates, correctional counselors are persons who are commonly referred to

as prison guards. Their duties primarily involve security rather than counseling.

To apply for this position, applicants must possess a valid Alabama driver's license, be a high school graduate or GED equivalent, be free from physical defects, be between the ages of 20½ years and 45 years at the time of appointment, and fall between the minimum height and weight requirements of 5′2″, 120 pounds and the maximum of 6′10″ and 300 pounds. There is no written examination for the position of correctional counselor trainee; the grade assigned each applicant is based on experience and education. Employment is competitive. When a position opens, the Board of Corrections makes a request to the State Personnel Office for three names from the register. If more than one position is being filled, one name is submitted for each additional position.

The selection process described above is qualified by one exception, Administrative Regulation Number 204, which allows for selective certification for appointment of either male or female employees from the State Personnel Department's registers. Institutional wardens and directors identify each institutional correctional counselor I position which they find requires selective classification. The following criteria are used to establish that selective certification is necessary:

A. That the presence of the opposite sex would cause disruption of the orderly running and security of the institution.

B. That the position would require contact with the inmates of the opposite sex without the presence of others.

C. That the position would require patrolling dormitories, restrooms, or showers while in use, frequently, during the day or night.

D. That the position would require search of inmates of the opposite sex on a regular basis.

E. That the position would require that the Correctional Counselor Trainee not be armed with a firearm.

Regulation 204 is the administrative means by which the board's policy of not hiring women as correctional counselors in contact positions in all-male penitentiaries has been implemented. Women correctional counselors are not, however, precluded from serving in contact positions in the all-male institutions other than the penitentiaries. Contact positions are those which require personal interaction with inmates. A dormitory patrol would be a contact position whereas a guard tower surveillance would not. (418 F.Supp. at 1175-1176.)

Summary of Argument

California is vitally concerned with the question of whether female correctional officers may be excluded from serving in contact positions in all-male penitentiaries. California's policy is not to exclude women from such positions.

California contends that any state rule or regulation that directly or indirectly excludes women from such positions clearly violates Title VII of the Civil Rights Act of 1964 (42 U.S.C. §2000e-2) relating to equal employment opportunities and also constitutes a violation of the Equal Protection Clause of the Fourteenth

Amendment by creating a constitutionally invalid classification.

Of greatest concern to California would be an adoption by this Court of a rule that prisoners incarcerated pursuant to valid criminal judgments have some ill-defined right of privacy which precludes the presence of women in their living quarters. California contends there is no such right, and to recognize or create such a right would require the states to abandon many efforts at creating a truly rehabilitated environment in prison, and unwarrantedly exclude from consideration for employment in such positions a substantial portion of the potential workforce.

ARGUMENT

INTRODUCTION

Alabama has appealed the entire part of the decision of the court below relating to hiring of prison guards. This decision dealt with two aspects of the Alabama statutes and regulations: (1) whether the minimum height and weight requirements for the position were valid under Title VII and the Constitution, and (2) the effect of Regulation 204 which excludes women correctional officers from contact positions in all-male penitentiaries. California does not use height and weight requirements for prison guard classes. We thus do not discuss the first issue presented.

California is, however, vitally concerned with the issue of exclusion of women from contact positions in all-male penitentiaries. Appellants appear to base their justification of their regulation which bars women from an entire class of jobs in the State's penal system on two distinct assertions. The first is that women would not be able to perform adequately and safely within the setting of an all-male penitentiary. The second is that the presence of women in male institutions violates the inmates' right of privacy. California respectfully contends that neither of these assertions is correct.

I.

Exclusion of Women From All Positions as Correction Officers Within All Male Prisons Is a Violation of Title VII of the 1964 Civil Rights Act

The purpose of the prohibition on sex discrimination in employment contained in Title VII of the 1964 Civil Rights Act (42 U.S.C. §2000e)[1] is to eliminate all discriminatory employment practices and to guarantee equal job opportunities for both sexes. *Hutchinson v. Lake Oswego School District #7,* 519 F.2d 961 (9th Cir. 1975); *Diaz v. Pan American Airways,* 442 F.2d 385 (5th Cir. 1971); *Sprogis v. United Air Lines,* 444 F.2d 1194 (7th Cir. 1971).

The Act basically prohibits discrimination in the hiring or discharging of any individual on the basis, *inter alia,* of sex (42 U.S.C. §2000e-2(a)). The major exception to the prohibition is for employment "where . . . religion, sex or national origin is a bona fide occupational qualification reasonably necessary to the necessary operation of that particular business or enterprise. . . ." (42 U.S.C. §2000e-2(e).)

The Bona Fide Occupational Qualification exception to the basic rule was designed to permit discrimination only in those situations where necessity requires the hiring of one sex exclusively and should be narrowly construed. 29 CFR 1604.2; *Weeks v. Southern Bell,* 408 F.2d 228, (5th Cir., 1969). Neither preferences of the employer, co-workers, clients or customers nor outmoded notions of what are proper roles for men and women constitute valid grounds for limiting hiring to one sex exclusively. In order to exclude women

[1]Title VII has been made applicable to State Governments by the 1972 Amendment. [Citation]

there must be some objective, demonstrable evidence that women cannot perform the duties associated with the job. *Weeks v. Southern Bell, supra.*

Alabama's prison regulation 204 is the very antithesis of a valid B.F.O.Q. The sole basis for the regulation appears to be the feeling on the part of prison administrators that women would not be able to perform adequately and safely. (418 F.Supp. at 1184.) This "feeling" on the part of prison administrators is countered by experience showing the successful integration of females at other penal institutions. As the decision of the Court below notes, highly experienced and well qualified experts on penal systems presented expert testimony indicating that the presence of women in the all male institutions contributes to the normalization of the prison environment and has an advantageous psychological effect upon the prisoners. (418 F.Supp. at 1184.)

For this court to elevate the subjective feelings of prison administrators to the status of law would be to destroy thirteen years of progress toward equal employment opportunities for women. The entire thrust of the cases dealing with women's rights to equal employment opportunities as embodied in Title VII, has been to discredit the traditional sex stereotyped basis for denying women equal access to employment opportunities. *Weeks, supra.* Nonetheless, the State of Alabama is asking this court to put its seal of approval on precisely those notions of decency and propriety which previous cases have held unjustly deprive women of economic opportunities.

Alabama has presented no objective or empirical data to support the contention of its prison officials,

that as embodied in Regulation 204 women could not perform adequately and safely in all-male penitentiaries. Indeed, as the court below noted, Alabama in fact does have women in contact positions in all-male institutions other than the four large penitentiaries. (418 F.Supp. at 1184.)

Amicus contends that appellants have not presented any support to establish that excluding women from all-male penitentiaries is a bona fide occupational qualification. We, therefore, submit that Regulation 204 violates Title VII of the 1964 Civil Rights Act and must be struck down.

II.
Regulation 204 Violates the Equal Protection Clause of the Fourteenth Amendment

The Court below held that Regulation 204, in addition to violating Title VII, also violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. (418 F.Supp. at 1185.) Alabama's Regulation 204 creates exclusionary job categories based on sex and is therefore subject to judicial scrutiny to determine if it is valid. ***Reed v. Reed,*** 404 U.S. 71 (1971); ***Kahn v. Shevin,*** 416 U.S. 351 (1974). Since judicial analysis of the validity of gender-based classification under the Fourteenth Amendment is in a state of flux, Amicus suggests it would be useful at this point to briefly outline the various approaches the court has taken and try to pinpoint the appropriate test for this particular classification.

A. Standard of Review for Gender-Based Classifications

Until recently, the Court reviewed gender-based classifications in relationship to the very permissive standard commonly known as "the rational basis test" and upheld such classifications "if any statement of facts reasonably [could be] conceived" in their justification. *McGowan v. Maryland,* 366 U.S. 420, 426 (1961). In 1912, the U.S. Supreme Court upheld a classification scheme pursuant to which men but not women had to obtain a license to do hand laundry in Montana. *Quong Wing v. Kirkendall,* 223 U.S. 59 (1912). The decision was based on the court's determination that:

> "If Montana deems it advisable to put a lighter burden upon women than upon men with regard to an employment that our people commonly regard as more appropriate for the former, the Fourteenth Amendment does not interfere by creating a fictitious equality where there is a real difference. Particular points at which that difference shall be emphasized by legislation are largely in the power of the state." 223 U.S. at 63.

In 1948, the Supreme Court upheld a statutory scheme which barred women from tending bar in Michigan. *Goesaert v. Cleary,* 335 U.S. 464 (1948). The Court held that:

> "Michigan could, beyond question, forbid all women from working behind a bar. This is so despite the vast changes in the social and legal position of women. The fact that women may now have achieved the virtues that men have long claimed as their prerogatives and now indulge in vices that men have long practiced, does not preclude the state from drawing a sharp line

> between the sexes, certainly in such matters as the regulation of the liquor traffic. . . . The constitution does not require legislatures to reflect sociological changes or shifting social standards. . . . 335 U.S. at 465-466.

It was not until 1971 that the Supreme Court of the United States concluded that classifications based on sex must be carefully reviewed and that mere rationality was not sufficient to justify such classifications. *Reed v. Reed*, 404 U.S. 71 (1971). *Reed* was followed in 1973 by *Frontiero v. Richardson*, 411 U.S. 677 (1973) in which the court determined that "classifications based upon sex, like classifications based upon race . . . are inherently suspect and must therefore be subjected to such judicial scrutiny." (411 U.S. 688.) In subsequent cases the U.S. Supreme Court appears to have eased the standard enunciated in *Frontiero*, *supra*, and evolved a third test which might fairly be called a "modified strict scrutiny test." Under this test, "classifications by gender must serve important governmental objectives and must be substantially related to those objectives" *Craig v. Boren*, ... U.S. ....., 97 S.Ct. 451 at 457 (1976).

B. Regulation 204 Does Not Meet the Standard of Review for Gender Based Classifications and Violates the Equal Protection Clause

Thus under the latest rules set down by this Court, Alabama's Regulation 204 must be examined to determine whether it is substantially related to the achievement of some important governmental objective. Alabama's prison officials have asserted that overall security in the prison system will suffer if women are hired in counselor positions. Amicus concedes that it

would be difficult to conceive of a more important governmental interest than that of maintaining security in the prison system. The more difficult question is whether the exclusion of women from "contact" positions bears a substantial relationship to the accomplishment of that goal.

Appellants advanced several supposedly objective reasons for their conclusion, most of them gleaned from statements made by various prison officials. (Defendants Brief on the Merits in the District Court pp. 27-28.) The following incidents were cited, among others, as support for Defendant's position:

> Female officer at Mobile Work Release caught discussing with inmates what "turns the ladies on." Also the length or the diameter of a man's penis being important in sexual intercourse with a female.
>
> Female clerk at Birmingham Work Release Center became romantically involved with an inmate. The clerk had access to inmate records.
>
> Obscene gestures made by inmates in the shower stalls at the Frank Lee Youth Center in the presence of a female officer.
>
> Inmates at Mobile Work Release referring to female officer as "baby" and "honey" which could lead to jealousy among inmates.
>
> Female correctional counselor pinched on buttocks at the Frank Lee Youth Center.

Amicus asserts that even the most casual persual of this "objective" evidence indicates that it is nothing more than statements of the deponents' subjective feelings. We believe that the lower court quite properly

rejected the assertion that such subjective feelings constitute a showing that women as a whole cannot adequately and safely perform the job.

In *Reed v. Reed, supra* and *Craig v. Boren, supra* the Court has rejected, as insufficient, justifications for gender-based classifications which are much stronger than the justifications put forth in the instant case. In *Reed* the statutory scheme which gave preference to men in probate matters was rejected despite the Court's recognition that the scheme would in fact reduce the case load and promote efficiency of the state's probate courts. In *Craig*, the state asserted that its statutory scheme prohibiting boys from drinking beer until they reached age twenty-one while allowing girls to do so at age eighteen was necessary to promote highway safety. In support of this contention the state introduced statistical evidence which established that .18% of the girls and 2% of the boys in the 18-21 year old age group were arrested for drunk driving.

The Court recognized that this did tend to show a correlation between sex and the interest to be served but nevertheless found the relationship too tenuous to justify the classification. Certainly the subjective feelings of the gentlemen who run the Alabama prisons do not even reach the level of jusitification which the Court has previously rejected in *Reed* and *Craig*.

The totally subjective nature of the justifications put forth by appellants can best be illustrated by a quote from the deposition of Judson C. Locke, Commissioner for the Alabama Board of Corrections. In response to a question concerning the basis for his opinion that men could perform the duties of a correctional officer better than women, Mr. Locke said:

> "The innate intention between a male and female. The physical capabilities, the emotions that go into the psychic make-up of a female versus the psychic make-up of a male. The attitude of the rural type inmate we have versus that of a woman. The superior feeling that a man has, historically, over that of a female." (Appendix p. 153.)

It is submitted that Alabama has failed to meet even the modified scrutiny requirements this Court has set for reviewing gender based classifications under the Equal Protection Clause. The District Court correctly concluded that Regulation 204 does violate the Equal Protection Clause.

III.

Prisoners Have No Right to Privacy Which Precludes the Presence of Women in Their Living Quarters

This Court has recognized that a personal right to privacy is protected by the Constitution even though not enumerated therein. *Roe v. Wade*, 410 U.S. 113 (1973); *Griswold v. Connecticut*, 381 U.S. 479 (1965). However, the Court has also recognized that the reality of incarceration necessitates the withdrawal of many privileges. *Price v. Johnston*, 334 U.S. 226 (1948); *Cruz v. Beto*, 415 U.S. 319 (1972). Even the most well protected of the enumerated civil rights guaranteed by the Constitution such as free speech are curtailed in the prison setting, *Pell v. Procunier*, 417 U.S. 817 (1974). Whatever limited right of privacy inmates do have, it is not sufficient to justify the total exclusion of women from employment opportunities in the prison. As suggested by the lower court, the problem can be dealt with by adopting compromise

but effective measures. The district court suggested selective work responsibilities among officers rather than selective job classifications. (418 F.Supp. at 1185.)

We respectfully suggest that other compromises are possible. For example waist or shoulder high partitions would protect prisoners from unwarranted surveillance by members of both sexes. Such a compromise might also serve to alleviate some of the conditions referred to by the Court below which were found to be shocking to the conscience of reasonably civilized people. *James v. Wallace,* 406 F.Supp. 318. If prisoners in fact do have a fundamental right to privacy in the showers and toilets, that right should protect them from invasions of that right by both sexes. Once again, we assert that individual notions of what constitutes propriety and decency should not be substituted for a careful analysis of what is demanded by law.

Furthermore, evidence introduced in the trial court shows that there is support among experts on the penal system for the assertion that the presence of women in all male penal institutions contributes to the normalization of the prison environment, and has a positive psychological effect upon the prisoners (418 F.Supp. at 1184). To counter this, appellants have put forth their unsubstantiated conclusion not only that women could not perform safely, but also that prison supervisors held an ill defined concern for the privacy of the inmates. This Court cannot permit prison officials to base correctional procedures or employment practices

on a Victorian notion of propriety. *Cf. Weeks v. Southern Bell,* 408 F.2d 228 (5th Cir. 1969). Prison officials should be free to experiment with new ways of dealing with security and rehabilitation in the prison setting. Our objective is not to berate Alabama penal institutions or those in charge of them. California claims no final answer to prison security or safety for inmates, nor have we discovered the ultimate system of rehabilitation. We are concerned, however, that an analysis of prison problems and the search for solutions, whether in Alabama or California, not become sidetracked by concern for prisoners' rights of privacy without first examining the nature of that right alleged and its consequences.

In most of its institutions (all but four all-male penitentiaries) Alabama has apparently successfully accommodated personal privacy and modesty rights for prisoners with the desirability and obligation of hiring women in contact positions by selective work responsibilities. It rather inconsistently urges here a rule that would allow the concept of privacy for inmates to prevail, with the consequences that would limit employment opportunities for women throughout the country.

Amicus suggests the result compelled by Alabama's position is neither required by law, nor desirable from any point of view. California urges that the District Court correctly concluded that ". . . this tension between the individual's right to employment without regard

to his or her sex and the inmates' right to privacy can be resolved by selective work responsibilities among correctional officers rather than by selective job classifications. . . ." (418 F.Supp. at 1185.)

Conclusion

For the foregoing reasons, California, as Amicus Curiae, urges the Court to affirm the decision of the Court below.

Respectfully submitted,

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